NO. 05-0076

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE VANDERBILT MORTGAGE AND FINANCE, INC.

OBJECTION TO MOTION TO TRANSFER OF RELATED CASES TO PRETRIAL COURT AND OBJECTION TO STAY

Statewide Repo Housing, LLC ("Statewide") and Eagle Lender Asset Services, Inc. ("Eagle Lender") object to the Motion to Transfer six lawsuits to a Pretrial Court pursuant to Rule 13 of the Texas Rules of Judicial Administration and object to the Motion to Stay.

Vanderbilt's Motion affects only six lawsuits involving fifteen manufactured homes. The total dollar amount in dispute as reflected on the warehouseman's notices of lien comes to only $69,474.

These are not the kind of cases where consolidation for pretrial "would promote the just and efficient conduct of the cases". All written discovery which has been served in five of these six cases has been completed. A grand total of one deposition has been taken in these six cases. There is one attorney representing Vanderbilt in all of these cases and the warehousemen are also represented by a single attorney

Trial is currently scheduled for February 22, 2005 in Vanderbilt v. Terrazas, No. 352-204253-04 in the 352nd District Court. Trial is currently scheduled for March 14, 2005 in Vanderbilt v. Modgling, No. 141-204903-04 in the 141st District Court. All discovery has or will be timely completed in these two cases. Vanderbilt filed this MDL motion to try to avoid those trial settings.

The disputes between these parties will be resolved much sooner by allowing the cases to be tried and, if appropriate, appealed. These cases should not be transferred.

BACKGROUND

Statewide and Eagle Lender are related companies in the business of helping landlords remove abandoned manufactured homes from their property. Procedurally this is done by the landlord filing an eviction case. If the landlord prevails, the Justice of the Peace issues a Writ of Possession which authorizes the Constable "to engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ". Texas Property Code § 24.0461(e). Once the home is removed and stored in a bonded or insured public warehouse, "the warehouseman has a lien on the property to the extent of any reasonable storage and moving charges incurred by the warehouseman". Texas Property Code § 24.0062. Eagle Lender and Statewide are bonded and insured. Upon moving manufactured homes pursuant to Writs of Possession, they send notice of their warehouseman's lien to the owner and to the lienholder.

The crux of the dispute between Vanderbilt and Statewide/Eagle Lender is that our moving and storage charges are higher than what Vanderbilt wants to pay.

VANDERBILT'S ALLEGED COMMON QUESTIONS OF FACT

Eagle Lender and Statewide dispute certain points made by Vanderbilt on pages 2-4 of its Motion to Transfer as follows:

1. Eagle Lender and Statewide deny that they cannot lawfully recover manufactured homes. The companies hire drivers who can legally obtain permits. Further, Statewide in fact is licensed by the Texas Department of Housing and Community Affairs as a Retailer/Broker/Installer. Eagle Lender and Statewide deny that they have ever recovered a home without their having been

engaged and authorized by a Constable or a Sheriff.

2. It is true that on three of the fifteen homes, the driver hired by Eagle Lender obtained a permit on only one-half of the double-wide home. The effect of that omission is a purely legal dispute. Permits were obtained on the other one-half of these three homes and all required permits were obtained on the other twelve homes.

3. Eagle Lender and Statewide dispute Vanderbilt's allegation that the storage charges are "incredibly high". Our charges are less than the daily storage rate authorized by the Vehicle Storage Facilities Act. Texas Occupation Code § 2303.155(b)(3)(B).

4. For the majority of the homes in question, Eagle Lender or Statewide gave notice to the lienholder within three business days or less of the time it acquired possession of the home pursuant to the Writ of Possession. Furthermore, in some instances, the lienholder received notice of the filing of the eviction suit from the land owner. In those instances, it was only when Vanderbilt failed to pick up the homes that a Writ of Possession was issued and the homes were moved by Eagle Lender or Statewide.

On pages 4-5 of its motion, Vanderbilt makes three legal arguments that Eagle Lender and Statewide do not have valid warehouseman's liens on any of the homes in question. Eagle Lender and Statewide dispute Vanderbilt's legal analysis and conclusions and will brief those issues if requested. However, those legal issues are irrelevant to the issue of whether these six cases should be transferred to a Pretrial Court.

There is one last point that must be addressed. Vanderbilt and its counsel are absolutely wrong that Judge Carroll's decision in the Eagle Lender v. Associates Housing Finance case is a "Final Judgment" with "a res judicata/collateral estoppel effect". A copy of Eagle Lender's Motion for New Trial filed on January 28, 2005 is attached as Exhibit A.

For all the above reasons, Eagle Lender and Statewide request that the panel deny Vanderbilt's Motion to Transfer of Related Cases to Pretrial Court and deny the Motion to Stay..

Respectfully submitted,

Rick K. Disney
State Bar No. 05898300

COTTEN SCHMIDT, L.L.P.
420 Throckmorton Street, Suite 500
Fort Worth, Texas 76102
817-338-4500 Telephone
817-338-4599 Facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Objection to Motion to Transfer of Related Cases to Pretrial Court was mailed to Shawn Brady, Seib & Brady, 350 Founders Square, 900 Jackson Street, Dallas, Texas 75202 by certified mail, return receipt requested on the 14th day of February, 2005.

Rick K. Disney

ORIGINAL FILED

CAUSE NO. 03-C-3768

FILED
JAN 28 2005
COUNTY CLERK
ELLIS COUNTY, TEXAS

EAGLE LENDER ASSET SERVICES, INC., Plaintiff,	§	IN THE COUNTY COURT
V.	§	
ASSOCIATES HOUSING FINANCE, LLC and CONRAD STRINGFIELD,	§	AT LAW NO. 1
Defendants.	§	ELLIS COUNTY, TEXAS

EAGLE LENDER ASSET SERVICES, INC.'S MOTION FOR A NEW TRIAL OR FOR RECONSIDERATION

Eagle Lender Asset Services, Inc. ("Eagle Lender"), Plaintiff, asks the Court to grant a new trial or to reconsider its prior decision and set aside the Judgment entered on December 29, 2004 in favor of Associates Housing Finance, LLC ("Associates").

Argument and Authorities

The Court should grant a new trial or reconsider its ruling because it erred in making the following rulings:

1. Conclusions of Law Nos. 6 and 7 are Contrary to Texas Law.

In conclusions of law Nos. 6 and 7, the Court found that, although Eagle Lender had a warehouseman's lien, it lost its lien under 7.209(d) of the Texas Business and Commerce Code because Eagle Lender allegedly unjustifiably refused to deliver the home to Associates. The Court based this conclusion on the admitted fact that Eagle Lender rejected the November 13, 2003 settlement offer to pay the sum of $3,010.40 to break down and move the home. Apparently, the Court construed this rejection of the settlement proposal as unreasonable and therefore a wrongful conversion of the home.

EXHIBIT
tabbies
A

In the first place, Rule 408 of the Texas Rules of Civil Procedure provides that settlement negotiations are not admissible. It is improper for the Court to even consider the settlement offer.

In the second place, the November 13, 2003 letter offered to pay Eagle Lender less than its out of pocket expenses of moving the home. The effect of the Court's decision is to sanction Eagle Lender by voiding its warehouseman's lien because it did not agree to accept an amount less than its actual costs. This is a fundamentally unfair result.

Thirdly, and most importantly, the Court erred in holding that Eagle Lender lost its lien because of conversion. "Conversion is any dishonest act of dominion wrongfully exerted over another person's personal property in denial of, or inconsistent with, that person's right in the property, either permanently or for indefinite time." Soto v. Sea-Road Intern, Inc., 942 S.W.2d 67, 72 (Tex.App.–Corpus Christi 1997, writ denied). If Eagle Lender had a warehouseman's lien, then its possession of the property was not wrongful. It is true that one lien holder can be liable for conversion as against another lien holder, if it refuses a proper tender of the amount claimed in the notice of lien. Collision Center Paint & Body, Inc. v. Campbell, 773 S.W.2d 354, 357 (Tex. App.–Dallas, no writ). A "tender" is "an unconditional offer by a debtor to pay a sum of money not less than the amount due on the obligation". Baucom v. Great. Am. Ins. Co. of N.Y., 370 S.W.2d 863, 866 (Tex. 1963) (emphasis added).

Associate's settlement letter of November 13, 2003 stated "Associates Housing Finance, LLC is willing to tender $3,690.40 as full compensation for any and all moving and storage charges. There would be mutual releases and payment would be delivered in trust and not to be negotiated until your client allows access to the property for our client to secure possession of its collateral" (emphasis added). This was not an unconditional tender, and, without one, there can be no

conversion as a matter of law.

When the Legislature wishes to impose consequences for refusing to accept a settlement offer, it does so explicitly. *See e.g.* TEX. BUS. & COM. CODE § 17.5052; TEX. CIV. PRAC. & REM. CODE §§ 42.004 and 147.048; TEX. FIN. CODE § 304.105; and TEX. INS. CODE § 541.159. With no support in the language of the statute, this Court's decision judicially amends Texas Property Code § 24.0062 to say a warehouseman loses its lien if it "unjustifiably" rejects a settlement offer.

This case was filed by Eagle Lender as a Declaratory Judgment to determine the extent of its lien. This Court's unprecedented ruling means that Eagle Lender, by rejecting a settlement proposal, is guilty of conversion, and therefore loses its entire lien. This Court's conclusion that Eagle Lender wrongfully converted the home because it rejected a settlement offer is absolutely contrary to Texas law.

2. The Court Erred in its "Mixed" Finding and Conclusion No. 9 That Eagle Lender's Storage Charges Were Unreasonable Based on Notice Being Sent to Associates Ten Days After Possession.

There is no statutory requirement that a warehouseman notify the lienholder on a manufactured home within any particular time period. It is true that Tex. Prop. Code § 94.203(b) requires a landlord to notify a lienholder that an eviction suit has been filed within three days of the suit having been filed if the tenant gave the landlord the lienholder's name under § 94.054. Eagle Lender was not the landlord and so this statute is inapplicable. It is also true that Tex. Prop. Code § 94.203(f) requires a landlord who removes a home from a lot through a Writ of Possession to send notice to the tenant within ten days stating where the home is located. Since the Legislature clearly felt that ten day's notice to the owner of the manufactured home was adequate, there is no basis in law for the Court's requirement that Eagle Lender give the lienholder three days notice.

The Court has judicially legislated a notice requirement on the warehouseman that is nowhere supported by Texas law. Even if the ten days notice was somehow unreasonable, the proper remedy would be to limit the number of days storage fees can be charged; not to invalidate the entire warehouseman's lien.

3. The Court Erred in Holding That a Storage Charge of $22.00 per Day per Side Was Unreasonable.

The Court relied on testimony that the typical rate for a consensual storage of a manufactured home is $10.00 per day per side. The Court noted that Eagle Lender was not licensed as a vehicle storage facility until almost a month after it recovered the manufactured home in issue. However, even if the Vehicle Storage Facilities Act (Tex. Occupation Code § § 2303.001- 2303.303) was not directly applicable, the Court should consider the storage fees authorized by that Act as an analogous standard to determine whether Eagle Lender's storage fees are reasonable.

Section 2303.003(a) of the Texas Occupation Code specifically notes that it does not apply to vehicles stored with the consent of the owner. There is no doubt that Eagle Lender's possession of this home pursuant to a Writ of Possession was without the consent of the owner.

In § 2303.155 of the Texas Occupation Code, the Legislature has expressly approved a $30.00 daily storage charge for any vehicle longer than 25 feet. Thus, for non-consensual storage of vehicles over 25 feet, the Legislature has defined the reasonable charge. Even if the Act is not directly applicable because Eagle Lender's license post-dated its possession of the Stringfield home, the standard set by the Legislature is still relevant on the question of a reasonable storage charge for a manufactured home over 25 feet long.

The Court's holding that Eagle Lender's charge of $22.00 per day storage for a 56 foot long manufactured home is simply in error, given that a $30.00 daily charge to store a 26 foot long RV

has been legislatively declared to be reasonable as a matter of law.[1]

4. The Court Erred in its Mixed Finding of Fact and Conclusion of Law No. 6 Wherein it Determined That $3,131.15 Is the Limit for a Reasonable Charge for Tear down and Moving.

There is no dispute that the $3,131.15 was the out-of-pocket cost paid by Eagle Lender for the tear down and move (excluding the dozer charge). The effect of the Court's decision is to decree that Eagle Lender is not legally entitled to make any profit. It cannot be seriously argued that the Legislature intended the warehouseman to move a home pursuant to a Writ of Possession with no profit whatsoever The phrase "to the extent of any reasonable and moving charges incurred by the warehouseman" in Section 24.0062 of the Texas Property Code should rightfully be interpreted to include some reasonable percentage mark-up over actual cost.

5. The Court Erred If it Found Eagle Lender's Not Being Bonded Negated its Claim to a Warehouseman's Lien.

In finding of fact No. 20, the Court found that Eagle Lender was not a bonded warehouseman when the Stringfield home was recovered. Tex. Prop. Code § 24.0061(e) authorizes the Constable to engage the services of a bonded or insured warehouseman. Tex. Prop. Code § 24.0062(a) gives the warehouseman a lien if the property is stored in a bonded or insured warehouse. The evidence was not disputed that Eagle Lender had garage keeper's liability insurance during all times in question. Thus, it was insured, met the requirements of the statute and accordingly was entitled to a warehouseman's lien.

---

[1] While Associates disputes that a manufactured home is a "vehicle" under the Vehicle Storage Facilities Act, federal law rejects that position. *See* 24 CFR § 3280.903(a).

6. The Court Erred in Concluding Eagle Lender Lost its Warehouseman's Lien Insofar as its Independent Contractor Driver Did Not Obtain a Permit on One-half of the Home.

It is true that failing to obtain a permit for the move of the home has both criminal and civil penalties. However, the Court erred in conclusion of law No. 3 that Eagle Lender is responsible for the acts of Cliff Garvin. An employer is typically liable for the acts of its employees when committed during the course and scope of the employment. There was no dispute that Mr. Garvin was an independent contractor, rather than an employee. Eagle Lender did not control either the manner or the means in which Mr. Garvin performed his services. Therefore, Eagle Lender is not liable for the acts of Mr. Garvin.

The Court erred in its conclusion that the failure to get the other one-half of the permit means the home was not moved "subject to applicable law" under Texas Property Code § 24.0061(e). The vast majority of evictions do not involve manufactured homes, so it is unlikely that Texas Legislature wrote the phrase "subject to applicable law" with a specific eye to Texas Transportation Code § 62.094 dealing with permits. Further, the warehouseman's lien specifically created by Texas Property Code § 24.0062(a) does not remotely suggest that a lien can be lost by someone's failure to pay for a $21.00 permit. And, even if that was the law, it would only apply to Eagle Lender's claimed warehouseman's lien on one-half of the Stringfield home.

Only one case was located that bears on this issue. In McGruder v. Will, 204 F. 3d 220, 221 (5th Cir 2000), the Fifth Circuit said that "[e]xecution of the Writ of Possession is contingent upon compliance with procedures in Section 24.0061 including adequate posting of notice." A reasonable interpretation of the "subject to applicable law" is that the warehouseman does not get a lien on the

tenant's property unless the notices set out in that statute were actually sent out. There is no dispute that the proper notices were sent to the owner/tenant in this case.

For all the above reasons, Eagle Lender respectfully requests that the Court grant its Motion for New Trial, or, alternatively, reconsider its finding.

Respectfully submitted,

Rick K. Disney
State Bar No. 05898300

COTTEN SCHMIDT, L.L.P.
420 Throckmorton Street, Suite 500
Fort Worth, Texas 76102
817-338-4500 Telephone
817-338-4599 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Eagle Lender Asset Services, Inc.'s Motion for a New Trial was mailed to Shawn Brady, Seib & Brady, 350 Founders Square, 900 Jackson Street, Dallas, Texas 75202 by certified mail, return receipt requested on the 27th day of January, 2005.

Rick K. Disney